86-1353

Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DALE FOLTZ, WARDEN,
Petitioner

vs.

WILLIE ARTHUR THIGPEN
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

WAYNE COUNTY PROSECUTOR'S OFFICE

TIMOTHY A. BAUGHMAN* (P-24381)
Chief of the Criminal Division
Research, Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5972

JAN J. RAVEN P35175
Assistant Prosecuting Attorney
Phone: (313) 224-5741

* Counsel of Record

129pp

QUESTIONS PRESENTED

I.

SHOULD CERTIORARI BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY IN THE FEDERAL CIRCUITS AS TO WHETHER A CRIMINAL DEFENDANT'S RIGHT TO DUE PROCESS OF LAW IS EVER VIOLATED BY INTRODUCING IDENTIFICATION TESTIMONY INTO EVIDENCE WHERE AN ACCIDENTAL, UNPLANNED, PRETRIAL IDENTIFICATION, NOT PROCURED BY ANY STATE ACTION, PRECEDED THE IN-COURT IDENTIFICATION (PARTICULARLY WHERE NOTHING ABOUT THE DEFENDANT'S CONDITION OR APPEARANCE AT THE TIME OF THE OUT-OF-COURT IDENTIFICATION SUGGESTED HE WAS A DEFENDANT IN A CRIMINAL PROCEEDING)?

II.

WHERE A STATE PRISONER HAS BEEN PROVIDED A FULL AND FAIR LITIGATION, IN THE STATE COURTS, OF HIS CLAIM THAT IDENTIFICATION EVIDENCE, RESULTING FROM DEFECTIVE PROCEDURES, WAS IMPROPERLY ADMITTED AT HIS TRIAL, SHOULD THE FEDERAL COURTS BE PRECLUDED UNDER STONE V POWELL FROM GRANTING FEDERAL HABEAS CORPUS RELIEF ON THAT GROUND?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DUANE CORY, WARDEN,

PETITIONER

VS.

WILLIE ARTHUR THIGPEN

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE SIXTH CIRCUIT

COURT OF APPEALS

NOW COMES Dale Foltz, Warden, by JOHN D. O'HAIR, Prosecuting Attorney, County of Wayne, and TIMOTHY A. BAUGHMAN, Chief of the Criminal Division, Research, Training and Appeals, and prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the Sixth Circuit of the United States,

entered in the above-entitled cause on December 30, 1986.

OPINIONS BELOW

The opinion of the Federal District Court is appended as Appendix A. The opinion of the Sixth Circuit Court of Appeals is appended as Appendix B.

STATEMENT OF JURISDICTION

The decision of the Sixth Circuit of the Court of Appeals was entered on October 27, 1986. Respondent's Petition for Rehearing, dated November 5, 1986, was denied by Order dated December 19, 1986. The judgment of the Sixth Circuit of the Court of Appeals was issued as mandate on December 30, 1986. The jurisdiction of this Court is invoked under 28 USC (1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The following statement of the case was drawn largely from both the majority and dissenting opinions of the Sixth Circuit in this case.

Respondent Thigpen was tried by a jury for, and convicted of, robbery armed pursuant to Mich. Comp. Laws Ann. Sec. 750.529 and with possession of a firearm during the commission of a felony

pursuant to Mich. Comp. Laws Ann. Sec. 750.227(b).

The complainant, Robert Jackson, testified at a pretrial hearing on Respondent's Motion to Suppress his identification and at trial, that he was working alone, at a gas station, at about 2:00 a.m. on February 7, 1981. He stated that he saw two men approach from the unlit side of the gas station. One of the men, later identified as Jeffrey Thigpen, was holding a battery. Mr. Jackson unlocked the door and spoke to the men through a crack in the door.

The men then came inside the station. Jeffrey Thigpen placed the battery on the floor and told Mr. Jackson to "fire it up". The second man, subsequently identified as Respondent Willie Arthur Thigpen, then put a gun to

the back of Mr. Jackson's head and announced a robbery.

After Jeffrey Thigpen took money from Mr. Jackson's pockets they went into a back room looking for more money. Mr. Jackson was ordered to get underneath a desk. The men left the station.

At the pretrial hearing held on Respondent's motion to suppress the identification testimony, defense counsel cross-examined Mr. Jackson. In addition to the foregoing, Mr. Jackson testified that he remembered Respondent as the second man. He answered "yeah", without qualification, when he was asked whether he was sure that Respondent was the second robber. He testified that he had been working three or four hours before the robbery occurred. He testified that he had not been drinking alcohol or taking any drugs. Mr. Jackson stated

that he saw Respondent in a lineup, conducted about nine hours after the robbery, but that he did not point him out to the police because Respondent was making faces, (frowning), and he was not sure that it was him. (Mr. Jackson identified Jeffrey Thigpen at that lineup.)

Mr. Jackson testified that he saw Respondent twelve days later at Jeffrey Thigpen's preliminary examination. Mr. Jackson testified, both at the pretrial hearing and at the trial, that he told his girlfriend that he recognized Respondent when he saw him at Jeffrey Thigpen's preliminary examination.

At both the pretrial hearing and at the trial, Mr. Jackson explained that he had seen Respondent both in the outer corridor and in the spectators' section during Jeffrey Thigpen's earlier trial.

Mr. Jackson testified that he recognized Respondent when he came into the courtroom the day of Jeffrey Thigpen's trial, (about two months later), and sat next to him in the spectators' section. It was then that Mr. Jackson informed a police officer that Respondent was the second robber. Respondent was subsequently arrested and charged.

At the pretrial hearing Mr. Jackson testified that he remembered Respondent as the second robber. He specified that he had not identified Respondent only because he had seen him in the lineup.

At the conclusion of the pretrial hearing, the trial court found that Respondent had not been sitting with his brother at the defense table when he was identified. She found that the identification was reliable and that there was a

sufficient factual basis to establish an independent identification.

The jury at Respondent's trial was instructed on the presumption of innocence and on the state's burden of proof. Mr. Jackson was questioned by both defense counsel and the assistant prosecuting attorney concerning all the circumstances surrounding his identification of Respondent.

At trial Mr. Jackson testified that he spoke to the two robbers at the door to the station under a "pretty bright" florescent light. Mr. Jackson testified that he looked at Respondent and that he saw him during the robbery. Mr. Jackson testified that the total elapsed time between his first sighting of the robbers and the last time he saw them, could not have been as little as one minute, could

have been less than ten minutes, and was more likely five minutes.

The police officers involved in Respondent's initial arrest and the search of his house, testified at trial that they followed two sets of footprints, in a freshly fallen snow, leading from the station to a house several blocks away. While outside the house the police heard more than one voice inside. They testified that Respondent answered their knock and that he consented to a search of the house. The officers indicated that Jeffrey Thigpen was found in the basement, hiding under a sheet. Two handguns and a canister of pennies like that taken from the station, were seized from the house.

It was brought out that Mr. Jackson gave the police descriptions of the robbers about five minutes after the

robbery. He described the robbers to the police as two black males, about six feet tall, with medium complexions. He stated that one of the robbers was wearing a short, brown jacket.

Respondent testified at trial that he had been at home, eating pizza, when his brothers, Jeffrey Thigpen and Oakland Thigpen, arrived. He testified that when the police were seen outside the house, his brothers ran to hide. He testified that Oakland had hidden upstairs and had not been found by the police during the search.

Respondent appealed to the Michigan Court of Appeals. After a remand to the trial court for an evidentiary hearing on Respondent's motion for a new trial, the Court of Appeals affirmed Respondent's convictions and sentences. The Court of Appeals found that the identifications of

Respondent at the preliminary examination and trial of Jeffrey Thigpen "were not contrived by the police", took place in room full of other people, and confirmed Mr. Jackson's earlier unspoken recognition of Respondent at the lineup. The Court held that the totality of the circumstances showed that the identifications at the court hearings were reliable. The Court characterized all the evidence against respondent as "overwhelming.

The Michigan Supreme Court denied Respondent's Application for Leave to Appeal.

By decision dated June 26, 1985, the Honorable Stewart A. Newblatt of the United States District Court for the Eastern District of Michigan, Southern Division, denied Respondent's Petition for Writ of Habeas Corpus. Addressing

the identification issue, Judge Newblatt found that, under the totality of the circumstances test, the record did not disclose an improper identification. He further stated:

> ". . .Finally, there was no suggestive conduct by the police. Cf., Stovall v. Denno, 388 U.S. 293 (1967)(highly suggestive one person 'show up'). Petitioner's accidental exposure to the victim was a result of his own voluntary conduct and did not render his identification unreliable. Smith v. Perini, supra. No relief is merited on this claim." (emphasis added)

REASONS FOR GRANTING THE WRIT

A.

As the statement of the case indicates, Respondent was identified by the complainant only after he voluntarily attended the preliminary examination and trial of his brother, Jeffrey Thigpen, who was the other defendant charged in

this matter. Neither the prosecutor nor the police arranged, or even participated in, these confrontations. Respondent was seated in the spectator section of the courtroom. Nothing about Respondent's appearance or condition would in any way have indicated to the complainant that Respondent was a defendant in this, or any other, criminal proceeding.

The Sixth Circuit majority found that Respondent's constitutional right to due process of law was violated by the admission of the identification testimony at his trial, holding that the state courts and the United States District Court were wrong in reaching a contrary conclusion in reliance on the fact that "police machinations did not cause the confrontations between the witness and the defendant." (Slip Op at 5) The Sixth Circuit majority found support for its position in the Ninth Circuit in the

case of Green v Logan, 614 F 2d 219 (CA 9, 1980)., and from district court decisions in other circuits noted in its opinion. (Slip Op at 6)

Other circuits have, however, reached a contrary conclusion in cases where, as here, the pretrial identification procedure was accidental, unplanned, and not procured by any state action. That was particularly true in those cases where, like this one, nothing about the defendant would have indicated to the identifier that he was a criminal suspect. United States v Colclough, 549 F 2d 937 (CA 4, 1977); United States v Massaro, 544 F 2d 547 (CA 1, 1977) cert denied 429 US 1052; United States v Neverson, 463 F 2d 1224 (D.C. Cir., 1972). Indeed, the Sixth Circuit majority opinion appears in conflict with an earlier decision of that Court where the admission of an identification

preceded by an accidental encounter, not arranged by the police, was found not to have violated the defendant's due process rights even though the defendant was obviously in police custody when the chance meeting occurred. Mock v Rose, 472 F 2d 619 (CA 6, 1972), cert denied 411 US 971.

Finally, this Court's recent decision in Colorado v Connelly, ___ US ___; 40 Cr L 3159 (1986) strongly suggests that the Sixth Circuit wrongly decided this case. In that case this Court held that state action is a necessary predicate to a claimed violation of the Due Process Clause of the Fourteenth Amendment. In that decision this Court specifically rejected an argument that sufficient state action was present because of the admission into evidence of the challenged evidence (a confession) at the defendant's trial. In

the instant case, because there was no state action precipitating the out-of-court identifications that Respondent claimed were in violation of his due process rights, and because the mere admission of the identification testimony at his trial is not sufficient state action for these purposes, a necessary predicate to his claim is similarly lacking.

B.

Respondent brought a pretrial motion to suppress the identification testimony of the complainant based upon his allegation that that identification was the product of an unduly suggestive identification procedure and that an in-court identification would lack a basis independent of any taint from that procedure. The trial court held a hearing on that motion, took testimony,

and issued a decision against Respondent. In his appeal of right to the Michigan Court of Appeals, Respondent again raised this issue. The Michigan Court of Appeals also rejected Respondent's arguments. The Michigan Supreme Court denied Respondent's Application for Leave to Appeal, which also raised this issue.

Respondent, therefore, was provided a full and fair litigation, by the Michigan state courts, of his claim that the identification evidence should not have been admitted at his trial. As the Hon. David A. Nelson of the Sixth Circuit, wrote in his dissenting opinion in this case, it is an "open question" whether a federal habeas court ought to consider the possibility of setting aside a state's resolution of this issue. (Slip Op at 13)

Exclusion of identification testimony that is the product of an unduly suggestive identification procedure is designed, in substantial part, to deter the police from conducting suggestive identification procedures. Any additional incremental deterrent effect which might arguably result from granting a petition for writ of habeas corpus on this basis, is outweighed by the costs to a rational system of criminal justice. Therefore, the rule of Stone v Powell, 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976), should obtain. That is particularly true in this case for two reasons. First, no police conduct whatsoever precipitated the out-of-court identification found suggestive. Second, an impartial jury heard and evaluated all pertinent information concerning the complainant's identification testimony. The decision of the Sixth Circuit

majority diminishes the historic function of the jury.

Even if Respondent were not precluded, pursuant to Stone v Powell, supra , from seeking federal habeas corpus relief in this case, the Sixth Circuit majority erred in granting the Petition for Writ of Habeas Corpus.

For all the foregoing reasons plenary review by this Court is required to resolve these issues.

CONCLUSION

For the reasons stated above Petitioner submits that plenary review should be granted.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of the Criminal Division
Research, Training and Appeals

JAN J. RAVEN P35175
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5741

Dated: February 15, 1987
JJR:er

A P P E N D I X

APPENDIX A

DISTRICT COURT OPINION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIE A. THIGPEN,

Petitioner,

v.

DUANE CORY,

Respondent.

CIVIL ACTION
No. 84-CV-8614-FL
HON. STEWART A. NEWBLATT

MEMORANDUM OPINION

I

Petitioner, Willie A. Thigpen, a prisoner at Camp Lehman, Grayling, Michigan, has filed this application for writ of habeas corpus pursuant to 28 U.S.C. Sec. 2254. Petitioner was convicted on July 7, 1981, in a jury trial in the Recorder's Court for the City of Detroit of armed robbery, contrary to M.C.L. 750.529 and possession

of a firearm during the commission of a felony, contrary to M.C.L. 750.227b. Petitioner was sentenced on July 15, 1981 to a term of ten to twenty years on the armed robbery conviction along with a two year consecutive sentence on the felony-firearm conviction.

The Michigan Court of Appeals affirmed his conviction on his appeal as of right on January 31, 1984 in an unpublished per curiam opinion. (Docket No. 60472). The Michigan Supreme Court denied his application for leave to appeal or other relief pursuant to Administrative Order 1983-4, 417 Mich. li in an order dated August 24, 1984. (Docket No. 73674). Petitioner filed his application for writ of habeas corpus in the United States District Court for the Western District of Michigan on November 14, 1984. The case was transferred to

the United States District Court for the Eastern District of Michigan on December 17, 1984.

II

Petitioner seeks to raise four issues:

A. Petitioner was deprived of a fundamentally fair trial by a witness' assertion of the Fifth Amendment in the jury's presence.

B. Petitioner was deprived of a fundamentally fair trial by the use of unduly suggestive identification procedure.

C. Petitioner was deprived of a fundamentally fair trial by the trial court's admission of prejudicial evidence.

D. Petitioner was deprived of a fundamentally fair trial by the trial court's exclusion of his brother's exculpatory hearsay statement.

A

Petitioner alleges that his brother's assertion of the Fifth Amendment deprived him of a fundamentally fair trial. In February, 1981, a gas station was robbed by two young men. Within minutes, the police arrived and followed two sets of footprints from the gas station to the Thigpen resident (sic) at 14572 Griggs Street. (Michigan Court of Appeals Opinion, p. 2, Transcript, Vol. I, pp. 229-230). Petitioner opened the door of the home at the officers' request. A search revealed part of the

proceeds of the robbery, two handguns, and Jeffrey Thigpen hiding under a sheet in the basement. (Michigan Court of Appeals Opinion, p. 2). Petitioner's defense rested on an allegation of mistaken identification. (Transcript, Vol. I, pp. 103-113).

Petitioner elected to testify on his own behalf. According to his testimony, the robbery was committed by Jeffrey and Oakland Thigpen, Petitioner's brothers. Petitioner alleges that he was mistakenly arrested on a faulty "process of elimination." While the robbery proceeds and the weapons were found in the house, Petitioner contends that one of the perpetrators, Oakland Thigpen, managed to evade the police search. (Trial Transcript, Vol. I, pp. 237-251). The defense rested without calling any other witnesses.

The prosecution attempted to rebut this testimony by presenting Oakland Thigpen as a witness. (Trial Transcript, Vol. II, p. 59). The jury was excused and Oakland Thigpen was sworn as a witness. (Trial Transcript, Vol II, p. 59). He asserted the Fifth Amendment. (Trial Transcript, Vol II, p. 60). An attorney was appointed to represent Oakland Thigpen. (Trial Transcript, Vol II, p. 63). The attorney advised Oakland Thigpen to continue in his assertion of the Fifth Amendment. (Trial Transcript, Vol. II, pp. 64-65). The prosecution then revealed that Oakland Thigpen had already given a statement to the police regarding the robbery. (Trial Transcript, Vol. II, pp. 67-68).

The trial court ruled that an evidentiary hearing was necessary to determine if Oakland Thigpen had made a

statement to the police. (Trial Transcript, Vol. II, pp. 69-70). Officer Gerrow testified that Oakland Thigpen made a statement denying involvement in the armed robbery of the gas station. (Trial Transcript. Vol. II, pp. 76). The trial court heard arguments from counsel and ruled:

> The court having heard from Sergeant Gerrow and the statements made by Mr. Oakland Thigpen, this court finds that there is no basis for Mr. Oakland Thigpen to invoke the Fifth Amendment, because there is not any evidence against Mr. Thigpen, he has not been zeroed in, was never zeroed in as a suspect in this case. I will order you to testify in this matter before the jury, Mr. Thigpen, or subject

yourself to contempt of court proceedings.

Mrs. Clarke, you may proceed with the questions, outside of the presence of the jury that you intend to ask Mr. Thigpen.

(Trial Transcript, Vol. II, p. 83).

After a brief examination in the jury's absence, Oakland Thigpen then testified before the jury that he was asserting his Fifth Amendment right to remain silent and that he could not remember anything from February, 1981. (Trial Transcript, Vol. II, pp. 83-93). The prosecution did not introduce Oakland Thigpen's prior statements into evidence.

The mere assertion of the Fifth

Amendment by a witness does not deprive an accused of his right to confrontation. See Mayes v. Sowders, 621 F.2d 850 (6th Cir.), cert. denied, 449 U.S. 922 (1980); United States v. Fleming, 504 F.2d 1045 (7th Cir. (1974). Cf. People v. Dyer, 140 Mich. App. 343, 364 N.W.2d 330 (1985); People v. Giacalone, 399 Mich. 642, 250 N.W.2d 492 (1977). A witness' assertion of his constitutional privilege to remain silent is at best ambiguous, as far as its evidentiary value. As was argued in the instant case, the silence may be exculpatory to Petitioner (the witness is silent to avoid confessing his own guilt) or the silence may be inculpatory to Petitioner (the witness is silent to avoid accusing his own brother).

The right to confrontation is violated when a witness asserts the Fifth Amendment and the prosecution injects the

witness' prior statements into evidence by cross-examination or extrinsic proof. Douglas v. Alabama, 380 U.S. 415 (1965). In Douglas, the prosecution read the entire confession of a codefendant witness into the record as a form of cross-examination. The "confession" was the only direct evidence of the defendant's guilt. The violation of the right to confrontation was a result of the prosecution's pointed questions, not the witnesses assertion of his constitutional right. See Tolbert v. Jago, 607 F.2d 753 (6th Cir. 1979) (concurring opinion of Judge Engel), cert. denied, 444 U.S. 1022 (1980).

In Petitioner's trial, the prosecution did not cross-examine Oakland Thigpen as a ruse for placing statements damaging to Petitioner before the jury. Oakland Thigpen's pre-trial claim of

innocence was not introduced at Petitioner's trial. Accordingly, Petitioner cannot claim a violation of his right to confrontation where no damaging evidence was admitted. No relief is merited on this claim.

B.

Petitioner alleges that he was deprived of a fundamentally fair trial by the government's use of unduly suggestive identification procedures. "A defendant is denied due process only when the identification evidence is so unreliable that its introduction renders the trial unfair." Smith v. Perini, 723 F.2d 478, 482 (6th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 1920 (1984) (citing Manson v. Brathwaite, 432 U.S. 98 (1977)). In this case, the allegation of "unduly suggestive identification" rests on an un-

usual set of facts surrounding Petitioner's pretrial trial identification.

Robert Jackson, a gas station attendant, was the victim of an early morning armed robbery in the City of Detroit. (Wade Hearing Transcript, pp. 10, 24-25). Later that same day, February 7, 1981, a lineup was conducted which included Petitioner and his brother, Jeffrey Thigpen, as suspects. (Michigan Court of Appeals Opinion, p. 2 and Wade Hearing Transcript, pp. 64, 67). The victim selected Jeffrey Thigpen as one of the two robbers but said nothing about Petitioner. (Michigan Court of Appeals Opinion, p. 1 and Wade Hearing Transcript, pp. 43, 72). Mr. Jackson's silence continued until April 13, 1981. On that day he informed the police that Petitioner was the "other robber." (Michigan Court of Appeals Opinion, p.

2).

A hearing was conducted to establish the accuracy of the identification. The Michigan Court of Appeals made the following factual determinations: (1) the victim did recognize Petitioner at the lineup as one of the robbers; (2) the victim said nothing because he was not "absolutely sure" and also because Petitioner complicated the identification process by "making faces;" (3) the victim observed Petitioner at two post-lineup court proceedings involving Jeffrey Thigpen and each time "identified him as the second robber; (4) the robbery occurred in a "well-lit" gas station; (5) the victim observed Petitioner for five minutes; (6) the victim's observations were not impaired by drugs or alcohol. (Michigan Court of Appeals Opinion, p. 2).

Based on these findings the Michigan Court of Appeals held that the identification was reliable and not the product of police machinations. (Michigan Court of Appeals, p. 3). The Court of Appeals also ruled that the identification at trial had an independent basis apart from the victim's two courtroom contacts with Petitioner. The factual findings of the Michigan Court of Appeals must be afforded a presumption of correctness. Smith v. Perini, supra; while the ultimate question of the reliability of the identification process is a question of law subject to full review by the federal courts. Id.

In applying the "totality of the circumstances" test of Manson v. Brathwaite, supra, the record does not disclose an improper identification. The victim had an adequate opportunity to

view Petitioner at the scene of the crime. Within a matter of a few hours, the victim made a positive identification of Petitioner, subject to Petitioner's attempts to thwart the identification process. Finally, there was no suggestive conduct by the police. Cf., Stovall v. Denno, 388 U.S. 293 (1967) (highly suggestive one person "show-up"). Petitioner's accidental exposure to the victim was a result of his own voluntary conduct and did not render his identification unreliable. Smith v. Perini, supra. No relief is merited on this claim.

C

Petitioner alleges that he was deprived of a fundamentally fair trial by

the trial court's admission of prejudicial evidence. As part of his cross-examination, the prosecution established that Petitioner was unemployed at the time of the armed robbery. (Trial Transcript, Vol. II, pp. 5-6). As a matter of law, this type of question is generally improper. Compare: People v. Foulkes, 130 Mich. App. 828, 345 N.W.2d 629 (1983); People v. Chaplin, 102 Mich. App. 748, 302 N.W.2d 569 (1980), reversed on other grounds, 412 Mich. 219, 313 N.W.2d 899 (1981). The trial court may well have erred in allowing questions regarding Petitioner's employment status.

"Mere errors of state law are not generally conizable (sic) in the habeas corpus context." Engle v. Isaac, 456 U.S. 107, 121, n.21 (1982); Melchior v. Jago, 723 F.2d 486, 491 (6th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 2156

(1984). The trial court's error must be so gross as to amount to a denial of fundamental fairness. Handley v. Pitts, 491 F.Supp. 597, 599 (1978), aff'd, 623 F.2d 23 (6th Cir. 1980); Maglaya v. Buckhoe, 515 F.2d 265 (6th Cir.), cert denied, 423 U.S. 931 (1975). The admission into evidence of the fact that Petitioner was unemployed at the time that the armed robbery occurred did not deprive Petitioner of a fundamentally fair trial. Handley v. Pitts, supra. The jury was presented with substantial evidence on which to base Petitioner's conviction. No relief is merited on this claim.

D

Petitioner alleges that he was deprived of a fundamentally fair trial by the trial court's exclusion of his brother's exculpatory hearsay state-

ment. Petitioner's defense to the charge of armed robbery centered on identity. Petitioner did not contest the occurrence of the armed robbery. He did attempt to introduce his brother, Jeffrey Thigpen's testimony that the robbery was committed by Jeffrey Thigpen and a man known as "Snake." (Transcript of Wade Hearing, pp. 7-8, Trial Transcript, Vol. I, pp. 222-224). The trial court ruled that the statement was hearsay and did not fit within Michigan Rule of Evidence 804(b)(3), an exception to the hearsay rule, for two reasons: (1) the portion of the statement that "Snake" committed the robbery was not against Jeffrey Thigpen's "penal interest" and (2) the statement lacked any corroborating circumstances. (Michigan Court of Appeals Opinion, p. 4).

Petitioner was not deprived of a

fundamentally fair trial by the trial court's ruling. The legal issue posed by petitioner was decided by the Supreme Court in Chambers v. Mississippi, 410 U.S. 284 (1973). A criminal defendant is entitled to introduce hearsay statements that another person is guilty of the charged offense if (1) the statements are supported by circumstances showing their reliability and (2) the declarant is available for cross-examination by the prosecution. Neither requirement was satisfied in this case.

In Chambers, the fact that the excluded statements were made contemporaneous to the offense was considered a corroborating factor. In addition, the witness' statements were also made spontaneously to several close acquaintances. Id. The factual content of the offered statements was corrobor-

ated by other witnesses. id. Most importantly, the offered statement "was in a very real sense self-incriminatory and unquestionably against interest." Chambers, 301. Jeffrey Thigpen's proposed testimony lacks any indicia of reliability.

Even if Petitioner had offered corroborating facts to support his brother's exculpatory statement, Jeffrey Thigpen was unavailable for cross-examination. At the time of Petitioner's trial, Jeffrey Thigpen had escaped from police custody and could not be located. (Michigan Court of Appeals Opinion, p. 3). As a matter of federal constitutional law, the declarant's availability for cross-examination at trial by the prosecution is a significant factor in the use of exculpatory hearsay statements. Chambers, at 301. Absent cross-

examination, the jury has no means to test the truthfulness of the hearsay statement. Since neither of the Chambers requirements were satisfied, the trial court's exclusion of Petitioner's brother's hearsay statement did not deprive Petitioner of a fundamentally fair trial. No relief is merited on this claim.

Accordingly, Petitioner's application for writ of habeas corpus must be denied. An appropriate order and judgment will be entered.

STEWART A. NEWBLATT
UNITED STATES DISTRICT JUDGE

DATED: 6-26-85

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIE A. THIGPEN,

Petitioner,

v. Civil Action No. 84-CV-8614-FL

HON. STEWART A. NEWBLATT

DUANE CORY,

Respondent.
_____/

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

At a session of said court, held in the Federal Building and U.S. Courthouse, Flint, Michigan on June 26, 1985

PRESENT: HONORABLE STEWART A. NEWBLATT, UNITED STATES DISTRICT JUDGE

This matter having come before the court on Petitioner's Application For a Writ of Habeas Corpus, pursuant to 28 U.S.C. Sec. 2254, and the court being fully advised in the premises, and for the reasons set forth in the attached Memorandum Opinion,

IT IS ORDERED that the Petition For Writ of Habeas Corpus in the above-entitled case be, and the same hereby is, DENIED.

STEWART A. NEWBLATT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIE A. THIGPEN,

Petitioner,

v. CIVIL ACTION
No. 84-CV-8614-FL
HON. STEWART A. NEWBLATT

DUANE CORY,

Respondent.
_____/

JUDGMENT

The above-entitled matter having come before the Court on a Petition for a Writ of Habeas Corpus, Honorable Stewart A. Newblatt, United States District Judge, presiding and in accordance with the Memorandum Opinion and Order entered on June 26, 1985.

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus be, and the same hereby is, DENIED.

Dated at Flint, Michigan, this 26th day of June, 1985.

ROBERT A MOSSING
CLERK OF THE COURT

BY: _____
DEPUTY CLERK

APPROVED:

_____
STEWART A. NEWBLATT
UNITED STATES DISTRICT JUDGE

APPENDIX B

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

No. 85-1641

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIE ARTHUR THIGPEN,
Petitioner-Appellant,

v.

ON APPEAL from the United States District Court for the Eastern District of Michigan,

DUANE CORY,

Respondent-Appellee.

Decided and Filed October 27, 1986

Before: JONES and NELSON, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

JONES, Circuit Judge, delivered the opinion of the court, in which CELEBREZZE, Senior Circuit Judge, joined. NELSON, Circuit Judge, (pp. 11-29) delivered a separate dissenting opinion.

JONES, Circuit Judge. At a jury trial in the state court, petitioner, Willie Arthur Thigpen, was found guilty of armed robbery and possession of a firearm during the commission of a felony. After exhausting his rights of direct appeal, he sought a writ of habeas corpus in the district court. He argued that he was denied constitutional due process by the admission of the robbery victim's in-court identification of him. He also argued that a number of state law errors made by the trial court deprived him of a fundamentally fair trial. The district court denied the writ, and petitioner now appeals.

The robbery victim and sole eyewitness, Robert Jackson, was working alone inside a gasoline station at 2:00 a.m. on February 7, 1981, when he saw two men approaching from the left side of the

gas station, which was unlit and dark. The man in front, later identified as Jeffrey Thigpen, was holding a battery. From inside the station Jackson told the men that he would not charge the battery. Jeffrey then asked Jackson through a crack in the door if he would buy it. When Jackson hesitated, Jeffrey walked past Jackson into the station and placed the battery on the floor.

Jackson now was facing Jeffrey inside the station, and the second man was behind Jackson just inside the door. Jeffrey asked Jackson to "fire it up," referring to the battery. Before Jackson could reply, however, the second man put a gun to the back of Jackson's head and told him to "give it up." Only then did Jackson realize that the men intended to rob him. When Jackson started to speak, the second man told him to "shut up." At

that point Jackson briefly turned to look at the man behind him, but testified that "most of the time" he looked at Jeffrey.

Next, Jeffrey searched Jackson for money while the second man remained "on [Jackson's] back," where Jackson "didn't pay too much attention" to him. After taking the money Jackson had in his pockets, Jeffrey insisted that there was more money in the station, Jackson acknowledged that there was, and led the two robbers to a "sort of dark" back room where he had hidden some money. Both robbers were behind Jackson as he walked to the back room.

From this point on, Jackson testified that he "really wouldn't be paying attention" to the two men's actions. The second man told Jackson to get under a desk, and a little later

Jackson realized they had left. Jackson testified that his total contact with the two men lasted from one to five minutes. Of that time, he testified that he looked at the second man "not too much." He got a "real good look at Jeffrey," but "not a good look at" the second man.

Police officers arrived at the station approximately five minutes after the robbery. Jackson described the robbers as two black males, approximately six feet tall, with medium complexions. He indicated that one of the robbers was wearing a short, brown jacket, but otherwise could not remember any identifying details about the robbers, including their clothing, weight, hairstyle, or facial hair.

The police officers followed two sets of footprints in the snow, which led

from the service station to a house several blocks away. While outside the house, the officers heard voices arguing inside. Willie Thigpen, the petitioner in this case, admitted the police officers into the house and allowedthem to search the premises. Upon searching the house, the officers found two handguns as well as a canister of pennies resembling the one taken from the service station during the robbery. They also found Willie Thigpen's brother, Jeffrey, hiding in the basement of the house with a sheet over himself. They arrested both Jeffrey and Willie.

Willie Thigpen's version of these facts at trial was that he had been home that night since around 9 p.m., and that he had been eating pizza and playing with his cat when his brothers Jeffrey and Oakland came in. He said they offered

him a canister of pennies, which he refused. When Oakland saw the police outside, both Oakland and Jeffrey ran to the back of the house. Willie contended that Oakland had hidden upstairs where he was not found because there were no lights. (Oakland, confessing to the robbery after Willie's conviction, corroborated Willie's version of the facts.)

Willie and Jeffrey Thigpen appeared in a line-up approximately nine hours after the robbery. Including the two brothers, there were only five men in the line-up. Jackson immediately identified Jeffrey Thigpen but did not say anything about anyone else in the line-up. The policeman conducting the line-up testified that he would have prevented anyone in the line-up from "making faces" if he had noticed it, and that no "face-making"

was brought to his attention. After Willie was not identified, the police released him.

Twelve days after the robbery, Jackson saw Willie Thigpen at Jeffrey's preliminary examination. When asked at Willie's trial what made him notice Willie at Jeffrey's preliminary examination, Jackson stated: "Like I said, I seen him when he was in the line-up when they sit and look like the same people, they looked different." But Jackson told no one, except allegedly his girlfriend, that he recognized Willie at this point.

Approximately two months after this, Jackson testified at Jeffrey's trial. A policeman testified at Willie's trial that Willie sat with his brother Jeffrey in the courtroom. Jackson testified that

Willie came in and sat down next to Jackson, and Jackson then recognized him. When asked what went through his mind at that time, Jackson testified "same thing, I seen him in the lineup. I seen him a few times, and I think that's the man that robbed me, yeah." During Jeffrey's trial, Jackson told an official that Willie was the second robber, Willie was subsequently arrested.

At Willie's trial the evidence against him consisted of the handgunds (sic) and the can of pennies recovered during the police search, Jackson's testimony concerning the robbery and identification, and the testimony of police officers concerning the search, apprehension and identification of Willie and Jeffrey Thigpen. Based on that evidence. Willie was convicted.

A conviction based on identification

testimony following pretrial identification violates the defendant's constitutional right to due process whenever the pretrial identification procedure is so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968). Because "reliability is the linchpin" of this analysis, Manson v Brathwaite, 432 U.S. 98, 114 (1977), courts have used two steps to find the use of identification testimony unconstitutional. First, the court evaluates the undue suggestiveness of the pre-identification encounters. If the encounters were unduly suggestive, the court evaluates the "totality of the circumstances" to determine whether there are nevertheless sufficient independent indicia of reliability. See, e.g., id.; Neil v. Biggers, 409 U.S. 188, 199-200

(1972).

In arriving at the conclusion that the pre-identification encounters in this case were not unduly suggestive, both the state appellate court and the federal district court relied on the fact that police machinations did not cause the confrontations between the witness and the defendant. This was an erroneous basis for decision, for the deterrence of police misconduct is not the basic purpose of excluding identification evidence. See Neil v Biggers, 409 U.S. at 198-199; Green v Loggins, 614 F.2d 219, 222 (9th Cir. 1980). Because it "is the likelihood of misidentification that violates a defendant's right to due process," Neil v. Biggers, 409 U.S. at 198, only the effects of, rather than the causes for, pre-identification encounters should be determinative of whether the

confrontations were unduly suggestive. In other words, we adopt the Ninth Circuit's holding in Green v. Loggins, 614 F.2d 219 (9th Cir. 1980) (Peck, J., sitting by designation), that,

> a court is obligated to review every pre-trial encounter, accidental or otherwise, in order to insure that the circumstances of the particular encounter have not been so suggestive as to undermine the reliability of the witness' subsequent identification.

Id. at 223.

In the case at hand it is undisputed that the witness encountered the defendant three times prior to identifying him as the second robber: at the line-up, at

Jeffrey's preliminary examination, and at Jeffrey's trial. Although only one of these confrontations was caused by the police, we consider all three to determine whether unduly suggestive encounters occurred.

An individual's appearance in a line-up suggests to a witness that the person is in police custody for some reason. Even if the police do not indicate that the people to be viewed are all suspects for that particular crime, seeing a man in a small line-up for a crime is likely to associate that person with the crime to some degree in the witness' mind. Indeed, in the case at hand, every time Jackson was asked about his thoughts when he later encountered Willie, Jackson testified that his immediate thought was that he had seen Willie in the line-up for the robbery.

The suspicion planted in Jackson's mind by Willie's presence in the line-up was significantly reinforced by seeing Willie at two court proceedings involving the man Jackson had identified at the line-up as the first robber. Federal courts have previously held that circumstances such as these are unduly suggestive, United States v. Ballard, 534 F. Supp. 749, 752 (M.D. Ala. 1982) (defendant seen at line-up and a series of related court proceedings); United States ex rel. Johnson v Hatrak, 417 F. Supp. 316, 327 (D.N.J. 1976) (defendant seen at line-ups and unrelated preliminary hearing), aff'd mem., 564 F.2d 90 (3rd Cir. 1977), cert. denied, 435 U.S. 906 (1978), and we agree. Jackson's repeated encounters with Willie Thigpen in connection with the investigation and trial for the robbery were unduly suggestive.

Having found that unduly suggestive encounters occurred in this case, we must next determine the "central question" - whether under the totality of the circumstances the identification was nevertheless reliable. Neil v. Biggers, 409 U.S. at 199. The Supreme Court has set out the factors to be considered:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199-200. Although we must afford a presumption of correctness to the state

court's factual findings concerning these factors, whether the factors demonstrate reliability in the identification process is a question of law for this court to decide. Sumner v. Mata, 455 U.S. 591 (1982) (per curiam).

At the pretrial hearing to determine whether the witness' identification testimony was admissible, pursuant to United States v. Wade, 388 U.S. 218 (1967), the trial court made factual findings concerning several of the factors. With respect to the first factor - the opportunity of the witness to view the criminal at the time of the crime - the state court correctly held that Jackson had viewed the robbers at close range inside the gas station under fluorescent lighting. The court also held that the witness observed the second robber for approximately five minutes.

However, the court based this findings on its cursory, leading examination of Jackson:

THE COURT: How long did the incident take place at the gas station approximately?

THE WITNESS: About five minutes.

THE COURT: So you had five minutes to observe Willie Thigpen for approximately 5 minutes; is that correct?

THE WITNESS: Yeah.

Wade Hearing Transcript, #14, T 63. The facts developed at trial demonstrate that

Jackson actually observed the second robber infrequently during the five-minute robbery. Jackson testified that the second man was directly behind him most of the time, that he turned to look at him briefly only once, and that although the man was not behind him after they moved to the back office, the office was dark and the witness was under a desk. Consequently, the trial court's finding at the Wade hearing concerning the length of the observation is not entitled to a presumption of correctness. 28 U.S.C. Sec. 2254(d)(3) (1982), and we accept the witness' trial testimony that he barely looked at the second robber during the robbery.

With respect to the witness' degree of attention, the trial court held that the witness was not drunk or under the influence of drugs. But the court did

not mention the degree of stress that the witness might have felt and how it might have affected his attention. This court has previously noted the important effects stress or excitement may have on the reliability of an identification. United States v. Russell, 532 F.2d 1063, 1066 (6th Cir. 1976). Jackson was obviously affected by such stress, for at trial he repeatedly indicated that he was too scared during the robbery to "pay too much attention" to the robbers.

The trial court did not explicitly make any findings concerning the third factor - the accuracy of the prior description of the criminal. Although Jackson could not remember how he had described the robbers, the policeman who made out the report testified that his entire description was of "two black males, approximately six feet ... one

wearing a short brown jacket ... medium complexion." While Willie is indeed a black male approximately six feet tall, that description fits many people. Accuracy also refers to how particularly a description matches a suspect, and Jackson was unable even to describe the robbers' weights, builds, hairstyles or facial hair.

Concerning the fourth factor - level of certainty - the trial court notes in its conclusions at the Wade hearing that Jackson did not identify Willie at the line-up because he "wanted to be sure of his identification." Thus, the witness' level of certainty on the day of the robbery was clearly low. It also seems to have been low at the first in-court confrontation since the witness continued to remain silent. Even later, at Willie's trial, during both direct and

cross-examination the witness stated only that he was "pretty sure" that Willie was the robber. The state court's findings do not contradict this.

Finally, the time between the crime and the confrontation is undisputed. The confrontation which rendered Jackson "pretty sure" that Willie was the robber occurred over two months after the robbery.

Altogether, none of the five factors indicates that Jackson's identification of Willie was reliable, and so the suggestive pre-identification confrontations between Jackson and petitioner did indeed create a substantial likelihood of irreparable misidentification. We therefore hold that the trial court violated petitioner's due process rights by admitting Jackson's testimony identifying Willie as

the second robber.

The next question is whether the admission of the identification testimony was harmless error. The Supreme Court in Chapman v. California, 386 U.S. 18 (1967), adopted the approach to harmless error that it had previously developed in Fahy v. Connecticut, 375 U.S. 85 (1963): "'[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" Chapman, 386 U.S. at 23 (quoting Fahy, 375 U.S. at 86-87). In the course of its analysis the Court criticized the California courts for their overemphasis of the other substantial evidence of a defendant's guilt. Id. Furthermore, the Court concluded that the beneficiary of the error has the burden of proving that the error was harmless beyond a reasonable doubt. Id. at 24.

In this case the state could not possibly prove beyond a reasonable doubt that the identification testimony did not influence petitioner's conviction. The state itself, at the evidentiary hearing on the defendant's motion for a new trial, characterized Jackson's identification of petitioner as "the first and probably the most important" evidence. At this same hearing the court intimated that it was the identification testimony that rendered unlikely a different outcome in a new trial. Although there was other evidence against petitioner - for instance, the handguns and some money from the robbery were in the house where he was found, and two sets of tracks led to that house from the gas station - those facts were consistent with his alibi. There was not the sort of substantial evidence linking defendant to the crime that would support a finding

that the identification was harmless error. See, e.g., United States v. Russell, 532 F.2d 1063, 1068 (6th Cir. 1976) (identifica- tions which violated due process not harmless in view of "dearth of other evidence"): Cf. United States ex rel. Johnson v. Hatrak, 417 F. Supp. 316, 327-28 (D.N.J. 1976) (identifications harmless when five other eyewitnesses testified).

Because we hold that Petitioner was deprived of due process by the admission of the identification testimony, we need not address the issue of whether he was denied a fundamentally fair trial by the state court's evidentiary errors. We do hold, however, that he adequately presented that constitutional claim in the state courts, and so met the exhaustion requirement. Rose v. Lundy, 455 U.S. 509 (1982).

Accordingly, we REVERSE the judgment of the district court denying the petition for a writ of habeas corpus, and REMAND the cause to the district court with instructions to grant the writ.

DAVID A. NELSON, Circuit Court Judge, dissenting. This is the kind of case that makes an appellate judge yearn for a set in the jury box. Where a witness particularly an unsophisticated witness) has testified on a close point, the printed record - which cannot capture the witness's gestures, or bearing, or the emphasis and inflection with which he answers key questions, and cannot enable the reader to gauge, as a jury can, the witness's sincerity, candor and intelligence - has obvious limitations as a guide to the truth. I do not know how I would have voted as a juror in this case, not having heard the testimony, but it is

by no means inconceivable that I might have voted for acquittal. It is possible that if, as an appellate judge, I had heard the appeal from the conviction, I would have favored reversal - for I have some concern about the adequacy of the trial court's jury instructions. The case is not here on appeal of the conviction, however, nor are we sitting as finders of fact to decide whether Willie Thigpen was guilty beyond a reasonable doubt. Our function is much narrower; to decide, as a matter of federal constitutional law, whether the State of Michigan sent Willie Thigpen to jail without having accorded him due process of law. I do not believe it did, and must therefore dissent.

In analyzing the process by which Mr. thigpen was convicted, it is helpful to bear in mind, I think, that the

process qua process was highly protective of the defendant's interests. Mr. Thigpen could not afford a lawyer, so the State of Michigan provided him one at its own expense. The lawyer was informed, prior to trial, of the identification testimony to be presented by the robbery victim, and was permitted to question the victim at great length in a pre-trial hearing held to assist the trial judge in making an informed decision on whether the testimony was sufficiently reliable to warrant letting the jury hear and evaluate it for itself. Counsel was then permitted to participate actively in the selection of the jury from a panel that had first been carefully instructioned on the presumption of the defendant's innocence, on the state's burden of proof, and on the concept of reasonable doubt. Those instructions were repeated once the jury had been chosen, sworn, and

seated. Under direct examination by the prosecutor and under cross-examination by Mr. Thigpen's own counsel, the victim gave to the jury the full background of his identification of Mr. Thigpen, including facts tending to cast doubt on its reliability. Mr. Thigpen was permitted, but not required, to give the jury his own version of the facts. At the conclusion of all the testimony, counsel were allowed to address the jury directly and offer arguments on what the evidence did or did not prove. The trial judge then instructed the jury on the applicable law, advising the jury yet again on the presumption of innocence, reasonable doubt, and the state's burden of proof. Only upon the unanimous vote of twelve jurors who had sworn to render a true verdict on all the evidence did the state allow Mr. Thigpen to be convicted. The judgment rendered on the

jury's verdict was appealed - still at state expense - to a three judge appellate court which sent the case back to the trial judge for an evidentiary hearing on Mr. Thigpen's motion for a new trial. After that, with the full record of the trial and the pre-trial and post-trial hearings before it, the appellate court - sworn, as we are, to uphold the United States Constitution - affirmed the conviction in a carefully reasoned opinion evidencing full awareness of the question about the reliability of the identification. Mr. Thigpen's counsel was then allowed to present the record to the Supreme Court of Michigan and seek leave for another appeal. Although the Supreme Court, having considered the record, was not persuaded that such relief should be granted, the defendant in a criminal case has no constitutional right to multiple

appeals,[1] and there can be absolutely no doubt that the "process" followed by the State of Michigan was eminently fair to Mr. Thigpen.

Where, as here, the state has provided an opportunity for full and fair litigation of a claim that evidence resulting from allegedly defective identification procedures should be withheld from the jury, I think it is an open question whether a federal habeas court ought even to consider the possibility of setting aside the state's resolution of that claim. In Stone v Powell, 428 U.S. 465 (1976), where the evidence in question was claimed to have been

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[1]For the first one hundred years after the federal constitution was adopted, indeed, "there was, in practical effect, no appellate review in federal criminal cases." Stone v. Powell, 428 U.S. 465, 475 n.7 (1976) (emphasis supplied).

obtained in violation of the Fourth Amendment's explicit prohibition against unreasonable searches and seizures, The Supreme Court held that as long as the state has permitted full and fair litigation of the Fourth Amendment claim, the results of the litigation may not be reexamined by the federal courts and "a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search or seizure was 'introduced at his trial." In the case at bar the evidence in question is not even arguably unconstitutional under the text of any provision of the Bill of Rights - to exclude that evidence, on the contrary, would be to diminish the historic function of the "impartial jury" contemplated under the Sixth Amendment - and at least insofar as the exclusionary rules for allegedly defective identification evidence are

based on the kinds of considerations applicable in the Fourth Amendment area, the logic of Stone v. Powell, 428 U.S. 465, supra, would preclude us from any reexamination of the determination that Mr. Jackson's identification testimony was sufficiently reliable to be submitted to the jury.

Be that as it may, the facts brought out at the pre-trial hearing on the reliability of the identification seem to me to provide more than adequate support for the trial court's decision to let the jury analyze the evidence for itself. Mr. Jackson, the victim of the robbery, explained that his gas station booth - which had "windows all the way around it" - was illuminated by fluorescent lighting. The two men who robbed him approached the station from a side that did not have exterior lighting, but Mr.

Jackson could see them coming, and the area in the immediate vicinity of the station was "lit up pretty bright." Although he did not have to unlock his door for them, Mr. Jackson did in fact unlock it, open it a crack, and speak to the men - face-to-face, presumably - through the opening. He told them he would not charge the car battery one of them was carrying, and he was told in reply that they did not want the battery charged but wanted to sell it to him. One of the men then walked past Mr. Jackson and set the battery down. Only for a minute did Mr. Jackson turn away from the doorway, where the second man remained standing, but before Mr. Jackson could turn back to face the second man again that individual pointed a gun at the right side of Mr. Jackson's neck and told him to give up his money.

Mr. Jackson testified unequivocally

that he remembered the defendant, Willie Thigpen, as the second man. When asked "are you sure that he's the other man that robbed you," Mr. Jackson answered, without qualification, "yeah."

Under questioning from the court, Mr. Jackson testified that he had been at work for three or four hours before the robbery, that he had not been drinking any alcoholic beverages ("I don't drink"), had not been taking any type of drugs ("I don't mess with no drugs"), and was not on any type of medication. Mr. Jackson could not remember what kind of clothing the man he identified as Willie Thigpen was wearing at the time of the robbery, but he did remember that Willie had a hat on - a circumstance that might have made it difficult to say anything about Willie's hairstyle.

Mr. Jackson testified that he saw

both robbers in a police lineup held the next day, but only told police about one of them, Jeffrey Thigpen, Willie's brother. Mr. Jackson did not point out Willie, who was also in the lineup, because, he testified, "I wasn't sure. He was making faces and I wouldn't want to pick the wrong person, so that's why I didn't." The trial judge asked if Willie looked different in the lineup, and Mr. Jackson explained that "he didn't have no jacket and things on," and "[h]he kind of frowned."

Mr. Jackson attended Jeffrey Thigpen's preliminary examination, where he saw Willie in the spectator seats. Mr. Jackson did not point Willie out to the police at that juncture, but he did tell his girlfriend, who was with him, that Willie looked like one of the robbers. (The testimony that he told his

girlfriend about Willie was repeated several times, but at the pre-trial hearing and before the jury; I know of no reason to question its accuracy.)

Mr. Jackson was also required to testify at Jeffrey's trial. A separation of witnesses had been ordered, but Mr. Jackson saw Willie in an outer corridor on the day after the trial; at that time he told the police that he recognized Willie Thigpen as the other person who had robbed him. When asked if he had identified Willie Thigpen "because you remembered him as being the robber," Mr. Jackson responded "because I remember - that's the only way I can say. I wouldn't want to point nobody out if it wasn't them." Mr. Jackson went on to deny that the only reason he had pointed Willie out was that he had seen him after the lineup. At no time in his testimony

at the pre-trial hearing did Mr. Jackson ever indicate that the thought which came to his mind in the post-lineup encounters was that he had seen Willie in the line-up.

Having listened to the testimony that takes up more than fifty pages in the written transcript of the pre-trial hearing, and having heard the arguments of counsel, the trial judge placed on the record an extensive summary of the evidence as to whether there was a "sufficient factual basis to establish an independent identification." She then noted that Willie Thigpen had not been sitting at the defense counsel's table, where Mr. Jackson might have identified him "only because he was at the table," and she concluded that "this was a reliable identification. . . ."

In its factual aspect, that deter-

mination must, by statute, be presumed correct; and although the constitutionality of the pre-trial identification procedure is not itself governed by the statute, "the questions of fact that underlie this ultimate conclusion are governed by the statutory presumption . . .." Sumner v. Mata, 455 U.S. 591, 597 (1982) (emphasis by the Court). Subject to certain exceptions not applicable here, and in the absence of a conclusion by the habeas court that "such factual determination is not fairly supported by the record [of the pre-trial hearing considered as a whole]," 28 U.S.C. Sec. 2254(d) provides:

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to a judgment of the

State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct. . . ." (emphasis supplied).[2]

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[2]The enactment of this statute "reflected the sentiment, shared alike by judges and legislators, that the writ [of habeas corpus] has overrun its historical banks to inundate the dockets of federal courts and denigrate the role of state court." Schnekloth v. Bustamonte, 412 U.S. 218, 273 (1973) (Powell, J., concurring.)

Where this presumption of correctness applies, the statute provides that a habeas applicant may overcome it only through "convincing evidence" that the state court's factual determination was erroneous. (See Sumner v. Mata, 449 U.S. 539, 550 (1981), where the Court, per Rehnquist, J., emphasized the words "convincing evidence.") Yet the record of this case shows that Willie Thigpen's own counsel, having just heard the same live testimony on which the trial court's factual determination was based, was aware of no evidence, "convincing" or otherwise, to suggest that Mr. Jackson had not had an opportunity to observe the faces of both robbers on the night in question. On the contrary, defense counsel told the jury, in opening statement, that:

"The testimony is going to show

> that Mr. Jackson . . . had a chance to look at both their faces for a considerable amount of time. That he had a chance to see both their faces, that he had a chance to view them during the robbery for a considerable length of time, as good as 5 to 10 minutes."

Defendant's own counsel having made this kind of concession as to the first (and possibly the most significant) of the four "factors" mentioned in Neil v. Biggers, 409 U.S. 188, 199 (1972), it is hard for me to see how we could properly second-guess him. In any event, we may not second-guess the trial court, which also heard the live pre-trial testimony; the opportunity of the witness to view the criminal at the time of the crime and the other Neil v. Bigges factors "are all

questions of fact as to which the statutory presumption applies." Sumner v. Mata, 455 U.S. 591, 597, supra.

Although the testimony that Mr. Jackson gave before the jury did not go as far as defense counsel expected it to, it was generally consistent with that at the pre-trial hearing, Mr. Jackson again pointed to Willie Thigpen as one of the two men who had come to his service station about two o'clock in the morning of February 7, 1981. Both men came to the door together, he told the jury, Mr. Jackson spoke to them in the doorway, under a "pretty bright" fluorescent light, before he let them in and before they pulled their guns on him. He did not testify that he was under stress at this point, and the jury could reasonably have inferred he was not under stress because he voluntarily unlocked his door.

Willie Thigpen remained with Mr. Jackson at the well-lit doorway while Jeffrey carried the bar battery inside; until Willie pulled his gun. Mr. Jackson had not realized he was being robbed. Thereafter Mr. Jackson's attention was mainly focused on Jeffrey, but he did look at Willie again when Willie, still holding him at gunpoint, told him to "shut up." After the robbers had taken Mr. Jackson into the station manager's office (where the light - which was not as bright as the fluorescent lighting - did not have to be turned on because it "probably was already on"). Mr. Jackson could not say that he got a "good" look at Willie, but he did testify "I turned around and I could see him." The total amount of time that elapsed between Mr. Jackson's first sight of the two men and the last time he saw them could not have been as little as one minute - "it was longer than one" -

and it "could have been" less than ten minutes, and more likely five minutes.

Mr. Jackson went on to explain to the jury the circumstances under which he finally volunteered to the police that Willie Thigpen was the second robber, and defense counsel, on cross-examination, invited Mr. Jackson to agree that he had simply concluded Willie "might be the guy." The response - delivered with an inflection and emphasis known to the trial judge and jury, if not to us - was: "it ain't no **might** be the guy." (Emphasis surmised.)

Mr. Jackson's eyewitness identification of Willie Thigpen as one of the robbers was corroborated by circumstantial evidence that the evidence that the jury could have found highly persuasive. The two sets of footprints going away

from the gas station in the snow led the police to a house in which they found both Willie and Jeffrey. There were no footprints going away from the house, and in searching the premises the police did not find the third man Willie claimed - must later - had also been in the house. The police did, however, find loot from the robbery and two handguns. The Michigan Court of Appeals, in holding that the trial court's denial of the motion for a new trial did not constitute an abuse of discretion, characterized the evidence against Willie Thigpen as "overwhelming."

On that kind of record, it is fair to say that only within the last two decades have the decisions of the United States Supreme Court provided must of any basis for even arguing that the State of Michigan must grant Mr. Thigpen a new trial or set him free. The line of

authority on which any such argument must be predicated begins with a trilogy of cases decided on June 12, 1967 - United States v. Wade, 388 U.S. 218, Gilbert v. California, 388 U.S. 263, and Stovall v. Denno, 388 U.S. 293 - where the Court fashioned new exclusionary rules "to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel." Stovall, supra, 388 U.S. at 297. Speaking through Justice Brennan, the Court noted that the new standards - which required trials to conduct precisely the kind of preliminary hearing held in the case at bar to determine whether the witness had an independent basis for identifying the accused - "were not foreshadowed in our cases; no court announced such a requirement until Wade was decided by the Court of Appeals for

the Fifth Circuit, 348 F.2d 557. The overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury." Stovall, supra, 388 U.S. at 299-300 (emphasis supplied).

The limits of the new doctrine are still being charted, and the degree of enthusiasm on the Supreme Court for cutting back the historic fact-finding functions of the jury has been far from uniform. See, for example, the dissent of Justice Black in Foster v. California, 394 U.S. 440, 447 (1969):

> "One of the proudest achievements of this country's Founders was that they had eternally guaranteed a trial by jury in criminal cases, at least until the

Constitution they wrote had been amended in the manner they prescribed.

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Of course it is an incontestable fact in our judicial history that the jury is the sole tribunal to weigh and determine facts. That means that the jury must, if we keep faith with the Constitution, be allowed to hear eye-witnesses and decide for itself whether it can recognize the truth and whether they are telling the truth. It means that the jury must be allowed to decide for itself whether the darkness of the night, the weakness of a witness' eyesight, or any other factor impaired the witness'

> ability to make an accurate identification. To take that power from the jury is to rob it of the responsibility to perform the precise functions the Founders most wanted it to perform." (Emphasis supplied).

Justice Black's eloquent dissent in Foster has not been explicitly embraced by the Supreme Court in the years since 1969, but neither, one suspects, has it been ignored. As the Court pointed out in Neil v. Biggers, 409 U.S. 188, 197 (1972), Foster is "[t]he only case to date in which this Court has found identification procedures to be violative of due process. . . ." That situation, I believe, remains unchanged as of 1986; as far as I know, Foster is still the only case in which the Supreme Court has found identification procedures violative of due process.

Preeminent among the several cases in which the Supreme Court has declined to find identification procedures violative of due process is Manson v. Brathwaite, 432 U.S. 98 (1977). There the Supreme Court reversed a decision in which the Court of Appeals for the Second Circuit had granted habeas relief to a prisoner convicted in a state trial on the testimony of a witness to whom the police had shown the suspect's photograph, all by itself, without utilizing either a photographic array or lineup. As is not true in the case at bar, the eyewitness identification constituted the "sole evidence" typing the defendant to the crime. Impermissibly suggestive as the use of a single photograph may have been, the Supreme Court elected to follow a "lenient" approach to the admissibility of identification testimony found to possess "certain features of relia-

bility." 432 U.S. at 110. Absent circumstances demonstrating "a very substantial likelihood of irreparable misidentification" (the test used in Simmons v. United States, 390 U.S. 377, 384 (1968)), the Manson court held, in language evocative of Justice Black's Foster dissent, that identification evidence

> ". . .is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." 432 U.S. at 116 (emphasis

supplied).

Among the circumstances held in Manson to have militated in favor of the finding of no constitutional violation was the fact that there had been "little pressure on the witness to acquiesce in the suggestion that [a single photogaph] display entails." 432 U.S. at 116. Since the witnesses examined the photo graph outside the presence of the police, moreover, there was no coercive pressure to make an identification arising from the presence of another. The identification was made in circumstances allowing care and reflection." Id.

In this respect, ours is an even stronger case. Here there was not merely "little pressure" on Mr. Jackson to identify Willie Thigpen as the second robber, there was no pressure at all.

Moreover, Mr. Jackson's identification of Willie Thigpen was made in circumstances allowing the utmost "care and reflection;" if Mr. Jackson had allowed himself a little less care and reflection, indeed, I might not be writing in dissent.

Simmons v. United States, 390 U.S. 377, supra, which provided the test applied in Manson, also involved the allegedly improper use of photographs by the police. Explicitly recognizing that photographs "may sometimes cause witnesses to err in identifying criminals," noting that "[a] witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions," and pointing out that "there is some danger that the witness may make an incorrect identification even if the police "follow the most correct photo-

graphic identification procedures," the Supreme Court nevertheless refused to prohibit the pre-trial use of photographic identification procedures. In a passage foreshadowing both Justice Black's dissent in Foster, 394 U.S. 440, supra, and Justice Blackmun's majority opinion in Manson, 432 U.S. 98, supra, the Court pointed out that "[t]he danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential of error." 390 U.S. at 383-84.

In a concurring opinion quoted with approval both in Manson, 432 U.S. at 113 n. 14, and in Watkins v. Sowders, 449 U.S. 341, 348 (1981), Judge Harold Leventhal amplified this point: "[c]ounsel can both cross-examine the

identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification - including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi." Clemons v. United States, 408 F.2d 1230, 1251 (D.C. Cir. 1968), cert. denied, 394 U.S. 964 (1969). And as Justice Stewart noted, speaking for the court in Watkins, supra: "the proper evaluation of evidence under instructions of the trial judge is the very task our system must assume juries can perform." 449 U.S. at 347.

A good example of the situation, mentioned in Simmons, where a "witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions," is presented in Coleman v. Alabama, 399 U.S. 1 (1970). There the

Court refused to disallow an in-court identification claimed to have been the fruit of impermissibly suggestive lineup procedures, notwithstanding that the witness - who had been shot by two men while changing a flat tire by the side of the road at night - had only a fleeting look at his assailants in the headlights of a passing car and had been unable to describe them to the police other than by saying vaguely that they were "young, black males, close to the same age and height." The men subsequently identified at the lineup were both black, but they were ten years apart in age (18 versus 28) and almost ten inches apart in height (6'2" versus 5'4-1/2"). Speaking through Justice Brennan, the court declared that the trial court "could find on the evidence adduced at the suppression hearing that [witness's] identification were entirely based upon observations at

the time of the assault and not at all induced by the conduct of the lineup." 399 U.S. at 5-6. The implications of that decision for the instant case are obvious.

Still another Supreme Court decision declining to find identification procedures violative of due process of due process is Neil v. Biggers, 409 U.S. 188, supra. There the defendant in a state court trial for rape had been identified by the victim in an impermissibly suggestive "show up" conducted many months after the attack. (The show up consisted of two detectives walking the sole suspect past the victim and having say, at her request, "shut up or I'll kill you.") The victim in Neil v. Biggers, while standing in the doorway of her unlit kitchen, had been grabbed from behind by a knife-wielding youth and

grappled to the floor. There was no light in the kitchen, but the victim testified that she had been able to see her assailant's face in "light from the bedroom shining through." She also testified that she had been able to see him as he walked her, at knifepoint, to the woods where she was raped - a walk of about two blocks in the moonlight. The only description the victim had been able to give the police was "very general," according to a federal district judge who subsequently granted a petition for habeas corpus, but the Supreme Court, in holding that the identification evidence was properly allowed to go to the jury, found the description "more than ordinarily thorough," even if it might not have satisfied Proust." 409 U.S. at 200.

It is far from obvious that the

victim in Neil v. Biggers had a better opportunity to view her assailant than Mr. Jackson had to view his. The degree of stress to which the rape victim was subjected, moreover, obviously exceeded Mr. Jackson's; when Mr. Jackson first talked with his assailants in the brightly lit doorway of his gas station, indeed he was under no stress at all. The degree of certainty registered by the rape victim (an articulate nurse) was greater than Mr. Jackson's but the lapse of time between the assault and the identification was also greater - seven months there and about one-third that time here. The Supreme Court having reversed the grant of habeas corpus in Neil v. Biggers in the belief that the reliability of the identification could properly be left for the jury, I am not persuaded that the trial court violated the federal constitution by allowing the

jury to hear Mr. Jackson's identification testimony here.

The Supreme Court decision that I believe becomes closest to supporting the conclusion that Willie Thigpen should be granted habeas relief in the case at bar is Foster v. California, 394 U.S. 440, supra. Although that was not a habeas corpus case, and the Court thus did not have to be concerned, as we must here, about "the limited nature of the review provided federal courts by [the habeas corpus statute]" (Sumner v. Mata, 449 U.S. 539, 541, supra), the underlying facts do resemble ors in several respects. The crime in Foster was the late-night robbery of a telegraph office. The manager of the office, who was the only witness, could not make a positive identification of the defendant in a lineup, notwithstanding that there were

only two other men in the lineup - both six or seven inches shorter than he - and the plaintiff was wearing a leather jacket similar to that worn by the robber. In a one-to-one confrontation held in a police station office after the lineup, with no one else present except prosecuting officials, the witness still could not make a positive identification of the plaintiff. Some days later the police arranged another lineup, in which the defendant was the only person who had appeared in the earlier lineup; only then did the witness prove able to make a positive identification. Without commenting on the opportunity of the witness to view the criminal at the time of the crime, or the witness's degree of attention at the time of that crime, or the accuracy of the witness's prior description of the criminal, the Supreme court reversed the conviction because, as

the court held, the identification procedures had been so unnecessarily suggestive and conducive to irreparable mistake as to be constitutionally impermissible. Speaking through Justice Fortas, the Court said:

> "The suggestive elements in this identification procedure made it all but inevitable that [the witness] would identify [the defendant] whether or not he was in fact 'the man." In effect, the police repeatedly said to the witness, 'This is the man.'"

***

In the present case the pre-trial confrontations clearly were so arranged as to make the resulting identifications

virtually inevitable." 394 U.S. at 443 (emphasis by the Court).

Although it found there had been a denial of due process, the Foster Court did not, it is interesting to note, go on to decide whether the error could be found "harmless" under Chapman v. California, 386 U.S. 18 (1967). The Court remanded the case to the state courts for decision of that question - a procedure applauded by Justice Black, who thought "this issue can usually be tried more efficiently, and just as fairly, by the local court that tried the case or by the local appellate court that heard the first appeal." 394 U.S. at 452.

In the case at bar, in contrast to Foster, the police did absolutely nothing to suggest to Mr. Jackson that "Willie Thigpen is the man." This was Mr. Jackson's suggestion, not that of the

police, by by no stretch of the imagination can the identification in this case be said to have been made "all but inevitable" by anything the police said or did. Mr. Jackson's identification of Willie Thigpen was corroborated, moreover, by independent, objective evidence of a kind not present in Foster.

If Mr. Jackson's accidental encounters with Willie Thigpen after the lineup were not nearly so suggestive as the planned encounters arranged by the police in Foster, neither were they so suggestive as that described in Judge Peck's opinion in Green v. Loggins, 614 F.2d 219 (9th Cir. 1980). Green did involve an accidental encounter (which happened to be the result of negligence on the part of the state), but its setting - a jail cell - "strongly suggested" that the person identified at

the conclusion of the encounter had been accused of a crime. 614 F.2d at 223. The jail cell, as Judge Peck noted, "clearly labeled [him] as a criminal defendant;" an encounter in a courthouse corridor (cf. United States v. Massaro, 544 F.2d 547 (1st Cir. 1976), cert. denied, 429 U.S. 1052 (1977)) would not have done so. Id. at 222-23. Willie Thigpen, unlike the suspect in Green, was not a criminal defendant and he had not been labeled as such, "clearly" or otherwise. He was not being held in a jail cell, and, as the trial court noted, he was not even sitting at defense counsel's table during his brother's preliminary hearing. The final (and crucial) encounter occurred in a courtroom corridor, as in Massaro, and Willie was obviously not in custody. In Green, moreover, the man in the cell was identified "specifically as the state's

suspect" when the police called him by name. 614 F.2d at 223. Nothing comparable occurred in the case at bar.

A case more pertinent here than Green, in my view, is United States v. O'Neal, 496 F.2d 368 (6th Cir. 1974). In O'Neal - which reached this court by direct appeal, significantly, and not through the habeas corpus route - this court affirmed affirmed the conviction of two men who were accused of having robbed a bank while masquerading as Brink's messengers. There were no fewer than eight witnesses to the robbery; none of them had been able to identify Mr. O'Neal in the first instance. Among the facts casting doubt on the reliability of the identification evidence on which Mr. O'Neal was ultimately convicted were these:

"1) That eight witnesses saw the

two bogus Brinks men;

2) None of the eight identified appellant's picture when they were shown it by the FBI;

3) At the first line-up none of the eight identified appellant, although he was in the line-up;

4) Three of them identified another party, one Eli Felder, while two other witnesses identified still other parties; and

5) The only two witnesses who did identify appellant as one of the bogus Brinks men had previously misidentified another party." 496 F.2d at

371.

Commenting on the misidentifications made by the two bank tellers who later identified Mr. O'Neal as one of the robbers, this court said:

> ". . . the jury was entitled to and did have all the relevant evidence as to identification and misidentification. The initial misidentification on the part of these eye-witnesses to a crime did not completely destroy the value of their testimony or render it inadmissible. The jury was fully advised of the original mistake and had it as well as the subsequent testimony identifying appellant before them to weigh. The weight to be given this evidence was for the jury to

determine." 496 F.2d 372 (Citations omitted).

At the end of its opinion in O'Neal, this court noted that the trial court had "cautioned the jury about the dangers of misidentification and instructed the jury about how to weigh that evidence." 496 F.2d at 373. Had I been reviewing Mr. Thigpen's conviction on direct appeal. I would have been concerned over the failure of the trial court to do that here. As O'Neal points out, however, the defendant "has a duty to assist the court in providing appropriate requested instruction . . . ." 496 F.2d at 373. No exception was taken to the jury instruction in the case at bar, no instruction on misidentification was requested, and I see in the instructions no plain error, of constitutional magnitude, that would require us to

vacate the conviction on collateral attack.

I turned finally to this court's recent decision in Smith v. Perini, 723 F.2d 478 (6th Cir. 1983), cert. denied, 466 U.S. 941 (1984). That was a rape case where the victim, a 15 year-old girl, was the only witness. Having been unconscious during much of the traumatic episode, the victim had considerable difficulty in identifying Mr. Smith as her attacker. She was not able to settle on a photograph of him until told that the man depicted in another of the photographs shown her had been in jail at the time of the attack. When she first confronted Mr. Smith in a police show up, moreover, she told the police "that's not him." The police then had her confront Mr. Smith two more times, requiring him on the first such occasion to shrug his shoulders and on the second to put his

hands around a police officer's throat. Only after she saw the simulated choking did the victim say she was sure Mr. Smith was her attacker. The state court of appeals affirmed the conviction, in a decision considering each of the factors enumerated in Neil v. Biggers, 409 U.S. 188, supra, and this court held that the state court's findings of fact were entitled to a presumption of correctness under 28 U.S.C. Sec. 2254(d). Accepting the state court's findings, this court held that the identification had sufficient indicia of reliability to make it constitutional for the jury to be allowed to determine the ultimate weight to be given it.

I find it difficult to reconcile the decision in the case at bar with the decisions of this court in Smith v. Perini, 723 F.2d 478, supra, and United

States v. O'Neal, 496 F.2d 368, supra, and I fear that this may be one of those proverbial "hard cases" that make bad law - law that may return to haunt us in future cases of armed robbery, or rape, or other such crimes where eyewitness identification is often important and often lacks absolute certainty. The power that Congress had given the federal courts to review state criminal proceedings on prisoners' applications for writs of habeas corpus is a limited power, and we might see that power limited even further if we fail to exercise appropriate restraint in its use. The Supreme Court has very pointedly reminded us of the high cost - to society and to our federal system - that liberal allowance of habeas corpus entails. Engle v. Isaac, 456 U.S. 107, 126-129 (1982). By undermining the usual principles of finality of litigation, it may frustrate

both deterrence and rehabilitation. Id. at 127, n. 32. It degrades the prominence of the trial itself and may render retrial difficult or impossible. Id. at 127. Primary authority for enforcing the criminal law rests with the several states, and "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." Id. at 128.

Willie Thigpen has had his day in court. He has been found guilty by a jury of his peers in a fair trial where none of the relevant testimony that he cared to give was withheld, where none of the relevant testimony that the victim was able to give was withheld either, and where all of the testimony given was directly relevant. Willie Thigpen's

conviction was unanimously affirmed by a Court of Appeals the judgments of which merits no less respect than our own. The authors of our federal constitution neither contemplated nor said that someone in Mr. Thigpen's position has a constitutional right to relitigate his conviction indefinitely. Federal intrusion into Michigan's criminal processes is not warranted under the circumstances of this case, in my judgment, and I would have affirmed the denial of the writ.

No. 85-1641

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIE ARTHUR THIGPEN,

Petitioner-Appellant,

v. O R D E R

DUANE CORY,

Respondent-Appellee

BEFORE: JONES and NELSON, Circuit Court Judges and CELEBREZZE, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having

favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

John P. Hehman, Clerk

No. 85-1641

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIE ARTHUR THIGPEN,

Petitioner-Appellant,

v. O R D E R

DUANE CORY,

Respondent-Appellee

BEFORE: JONES and NELSON, Circuit Court Judges and CELEBREZZE, Senior Circuit Judge

J U D G M E N T

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed and the case is remanded with instructions to grant the writ.

No costs taxed.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

_____

Clerk

Issued as Mandate: December 30, 1986

COSTS: NONE Attest:

Deputy Clerk

Filing fee.....$

Printing.....$

Total.....$

EDITOR'S NOTE

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No. 86-1353

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DALE FOLTZ, WARDEN, Petitioner,

v.

WILLIE ARTHUR THIGPEN, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DAVID R. RHEIN
Brown, Todd & Heyburn
1600 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5400
Counsel for Respondent

QUESTIONS PRESENTED

1. Should certiorari be granted to resolve a split of authority in the federal circuits when there is in fact no split of authority and the lower court's decision is consistent with prior decisions of this Court?

2. Should the decision in Stone v. Powell, 428 U.S. 465 (1976), be expanded to preclude habeas corpus relief from the admission of unreliable identification testimony at trial?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DALE FOLTZ, WARDEN, Petitioner,

v.

WILLIE ARTHUR THIGPEN, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondent, Willie Arthur Thigpen, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 804 F.2d 893 (6th Cir. 1986).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Sixth Circuit's Decision is Consistent with Applicable Supreme Court Authority, and Does Not Create Any Split of Authority in the Federal Circuits

The petitioner contends that, absent improper police conduct, the admission of unreliable identification evidence based on impermissibly suggestive pretrial confrontations cannot violate a defendant's constitutional right to due process. The petitioner finds implied support for his contention in this Court's decision in Colorado v. Connelly, 479 U.S. _____, 93 L. Ed. 2d 473 (1986), and in the decisions of several federal courts of appeals. The petitioner's contention, however, is not supported by the holdings of the cases upon which he relies. Moreover, it flies in the face of nearly twenty years of applicable Supreme Court precedent.

In Simmons v. United States, 390 U.S. 377, 384 (1968), this Court stated that a conviction based on identification testimony following a pretrial identification violates the defendant's constitutional right to due process whenever the pretrial identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Four years later, this Court confirmed that the primary evil to be avoided is the substantial likelihood of irreparable misidentification, and stated that "it is the likelihood of misidentification which violates a defendant's right to due process," not the actions of the police. Neil v. Biggers, 409 U.S. 188, 198 (1972). In Manson v. Brathwaite, 432 U.S. 98, 114 (1977), this Court again confirmed its previous holdings, stating that "reliability is the linchpin in determining the admissibility of identification testimony."

Lower courts have had no difficulty interpreting and applying this Court's holdings with respect to the admissibility of unreliable identification evidence. In Green v. Loggins, 614 F.2d 219 (9th Cir. 1980), for example, the Ninth Circuit affirmed a district court's grant of a writ of habeas corpus because of an impermissibly suggestive pretrial confrontation procedure. The Ninth Circuit recognized that "an in-court identification by a prosecution witness may prove to be unreliable, even though the pre-trial encounter in question has not involved any culpable police conduct." Id. at 222. The court explained that the inadvertence of a pretrial confrontation is often a factor in a court's decision to admit identification evidence, "not because there has been an absence of wrongful police activity, but only because the circumstances surrounding an accidental encounter are often

directly relevant to the question of the reliability of the in-court identification." Id. The court recognized that the lack of suggestiveness of most inadvertent confrontations did not mean that every inadvertent confrontation is automatically beyond constitutional scrutiny. Id. at 223. Noting this Court's explicit instruction that "it is always necessary to 'scrutinize any pretrial confrontation,'" Kirby v. Illinois, 406 U.S. 682, 690 (1972) (emphasis in original) (quoting United States v. Wade, 388 U.S. 218, 227 (1967)), the Ninth Circuit recognized that a court is obligated to review every pretrial confrontation to ensure that the confrontation was not impermissibly suggestive. 614 F.2d at 223.

Federal district courts have reached similar results. In United States v. Ballard, 534 F. Supp. 749, 751 (M.D. Ala. 1982), the district court recognized that whether the confrontation involved improper police conduct was irrelevant. Instead of relying on police conduct, the court held that "due process is violated by the admission of an eye-witness identification made after any unduly suggestive encounter, unless the identification is independently reliable." Id. (citing Green, 614 F.2d at 222-25). Similarly, in Gonzales v. Hammock, 477 F. Supp. 730 (S.D. N.Y. 1979), rev'd on other grounds, 639 F.2d 844 (2d Cir. 1980), cert. denied, 449 U.S. 1088 (1981), the district court noted that an inadvertent confrontation can induce a witness to identify a suspect even though the police have no intent to suggest. Id. at 735.

None of the cases cited by the petitioner have sought to add to this Court's analysis the proposition that improper police conduct is a prerequisite to impermissible suggestiveness. In United States v. Neverson, 463 F.2d 1224 (D.C. Cir. 1972), the defendant maintained that a witness' identification

was tainted by two pretrial confrontations. The first occurred when the witness inadvertently encountered the defendant on the street shortly before the witness viewed the defendant in a line-up. The second occurred when the police, while arranging the line-up, told the defendant that he could take whatever position in the line-up he wished.

There was conflicting testimony as to whether the second pretrial confrontation ever occurred. The District of Columbia Circuit upheld the trial court's determination that it had not.

With respect to the first pretrial confrontation, the District of Columbia Circuit noted that the witness immediately identified the defendant upon observing him on the street. Id. at 1230. In determining that the identification of the defendant by the witness was reliable, the court noted the witness' opportunity to view the defendant at the time of the crime, the witness' description of the defendant shortly after the crime, and the witness' identification of the defendant's photograph before the pretrial confrontation. Id. at 1225-26. Thus, the court held that the pretrial confrontation was not impermissibly suggestive and that the identification of the defendant was reliable. The court did not attempt to use the inadvertent nature of the pretrial confrontation as an excuse for abandoning the traditional reliability analysis.

Mock v. Rose, 472 F.2d 619 (6th Cir. 1972), cert. denied, 411 U.S. 971 (1973) also does not support the petitioner's contention. In Mock, the Sixth Circuit held only that the inadvertent nature of the pretrial encounter was one of several factors involved in its determination. Id. at 621. For example, the court also relied on the fact that the

witness had immediately identified the defendant upon observing him during the pretrial confrontation. Id.

Similarly, in United States v. Massaro, 544 F.2d 547, 550 (1st Cir. 1976), cert. denied, 429 U.S. 1052 (1977), the First Circuit noted that the pretrial confrontation was inadvertent, but also noted that there was no suggestiveness under the facts. The court stated that the reliability of the identification was supported by the witness' spontaneous and positive identification of the defendant during the pretrial confrontation. Id. at 551.

The decision of the Fourth Circuit in United States v. Colclough, 549 F.2d 937 (4th Cir. 1977), does contain dicta that supports the petitioner's contention. Although the court opined that an inadvertent confrontation would not violate due process, however, the court nevertheless based its holding on a determination that the identification was reliable under the circumstances. The Fourth Circuit noted that the witness' identification of the defendant during the pretrial confrontation was immediate, spontaneous, and positive. Id. at 941. The court also noted that the defendant was standing in a crowd of people at the time of the pretrial confrontation, and that there was nothing about the defendant to attract the witness' attention. Id. Finally, the court observed that there had been no intervening line-up or prior observations of the defendant by the witness. Id. Thus, the Fourth Circuit's holding was based on the reliability of the identification--not the inadvertent nature of the confrontation.

This Court's recent decision in Colorado v. Connelly, 479 U.S. ____, 93 L. Ed. 2d 473 (1986), does not weaken this Court's emphasis on reliability as the determinative factor in evaluating the admissibility of identification evidence based

on impermissibly suggestive pretrial confrontations. Nor does it support the petitioner's argument.

The petitioner seeks support from this Court's holding in Connelly that coercive police conduct is a prerequisite to a finding that a confession is not voluntary so as to deprive the defendant of due process upon its admission into evidence. See 93 L. Ed. 2d at 484. In Connelly, however, this Court noted that the cases in which this Court has considered the admissibility of involuntary confessions have traditionally contained a "crucial element of police overreaching," id. at 482, and that the purpose of excluding involuntary confessions has been to "substantially deter future violations of the Constitution." Id. at 484. Obviously, the exclusion of involuntary confessions would serve no deterrent purpose if they were not the result of improper police conduct. It was this reasoning, and the emphasis on deterrence, that led to this Court's decision in Connelly.

In contrast, this Court's decisions in Simmons, Biggers, and Manson have consistently focused on the reliability of the challenged evidence--not the deterrence of improper police conduct. Unlike confessions, the admissibility of which are determined on the basis of police conduct "without regard to reliability, the admissibility of identification evidence is entirely dependent on reliability." Summitt v. Bordenkircher, 608 F.2d 247, 251 (6th Cir. 1979). In evaluating the reliability of identification evidence, the responsibility for impermissibly suggestive pretrial confrontations is irrelevant. Thus, the rationale employed by this Court in Connelly simply does not apply in the context of suggestive pretrial confrontations.

The Sixth Circuit's decision in this case reflects a proper application of this Court's reliability analysis. A brief review of the facts in this case clearly demonstrates the impermissible suggestiveness of the pretrial confrontations.

Approximately nine hours after the robbery, the police put the respondent, Willie Thigpen, in a five-man line-up. The line-up also included Willie Thigpen's brother, Jeffrey. The witness, Robert Jackson, immediately identified Jeffrey Thigpen as one of the two robbers. Despite a prolonged opportunity to view Willie Thigpen in the line-up from a distance as close as three or four feet, Jackson failed to identify Willie Thigpen as one of the robbers. Over the next two months, Jackson saw Willie and Jeffrey Thigpen together at criminal hearings at which Jeffrey was prosecuted for the robbery. He saw them come to court together. He saw them sit together before Jeffrey's trial. Jackson later testified that, each time he saw Willie Thigpen at the criminal hearings, he remembered having seen Willie Thigpen at the line-up.

Although Willie Thigpen was not a defendant at Jeffrey's criminal hearings, Jackson nevertheless saw Willie Thigpen with Jeffrey in the context of a prosecution based on the robbery. Jackson knew that Willie and Jeffrey Thigpen were together, but he did not know that the reason they were together was because they were brothers. Instead, Jackson knew that Jeffrey Thigpen was one of the robbers and that Willie Thigpen was one of four other men presented in the line-up as potential suspects. Thus, during a series of criminal proceedings related to the robbery, Jackson saw a man he knew to be a suspect in the robbery together with a man he

knew to be one of the robbers. The extreme and impermissible suggestiveness of the pretrial confrontations is undeniable.

Having recognized the impermissible suggestiveness of the pretrial confrontations, the Sixth Circuit properly turned to a determination of the reliability of the identification. The Sixth Circuit evaluated the reliability of the identification evidence under the five-factor test established by this Court in Neil v. Biggers, 409 U.S. 188, 199-200 (1972). The court properly concluded that none of the five factors supported the reliability of Jackson's identification of Willie Thigpen. 804 F.2d at 897. Accordingly, the court granted habeas corpus relief.

II. The Reasoning of this Court in Stone v. Powell Does Not Apply to the Admission of Unreliable Identification Evidence

The petitioner's reliance on Stone v. Powell, 428 U.S. 465 (1976), is misplaced. The petitioner contends that the exclusion of identification evidence based on impermissibly suggestive pretrial confrontations "is designed, in substantial part, to deter the police from conducting suggestive identification procedures." Petition at 21. In view of the substantial body of case law from this Court, the federal courts of appeals, and the federal district courts, however, the petitioner's contention is absurd.

This Court has consistently repudiated the notion that the deterrence of police misconduct has any part in evaluating the admissibility of identification evidence based on impermissibly suggestive pretrial confrontations. See Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Neil v. Biggers, 409 U.S. 188, 198 (1972); Kirby v. Illinois, 406 U.S. 682, 690 (1972). Accord Green v. Loggins, 614 F.2d 219, 222 (9th Cir. 1980); Summitt v. Bordenkircher, 608 F.2d 247, 251 (6th Cir. 1979);

United States v. Ballard, 534 F. Supp. 749 (M.D. Ala. 1982); Gonzalez v. Hammock, 477 F. Supp. 730 (S.D.N.Y. 1979), rev'd on other grounds, 639 F.2d 844 (2d Cir. 1980), cert. denied, 449 U.S. 1088 (1981).

As in Connelly, the emphasis in Stone v. Powell is not on reliability, but on the deterrence of improper police conduct. This Court held that there would be no deterrent purpose in granting federal habeas corpus relief to a state prisoner when the state had provided an opportunity for full and fair litigation of a Fourth Amendment claim. Indeed, Chief Justice Burger emphasized the distinction in his concurring opinion by noting that Stone v. Powell did not involve an attempted exclusion of evidence on the basis of any lack of reliability. 428 U.S. at 496-97.

Even if this Court's decision in Stone v. Powell were extended to this case, habeas corpus relief would not be precluded because Willie Thigpen did not receive a full and fair litigation of his claim in the Michigan state courts. Prior to the decision of the Sixth Circuit, none of the lower courts had evaluated Willie Thigpen's claim under the analytical test mandated by this Court in Simmons, Biggers, and Manson. Thus, even under an extension of Stone v. Powell, Willie Thigpen would be entitled to habeas corpus relief.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID R. RHEIN
Brown, Todd & Heyburn
1600 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5400

Counsel for Respondent